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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

DANILO PAED TANTAY,

Petitioner,

v.

MICHAEL B. MUKASEY,
Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Attorney General, when deciding whether to forgive acts of misrepresentation at the time of immigration under sec. 237(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. sec. 1227(a)(1)(H), may cite the existence of those acts as a reason to deny the forgiveness waiver.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Danilo Paed Tantay, by and through undersigned counsel, respectfully petitions for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1), the opinion of the Board of Immigration Appeals (App. 2) and the oral decision of the immigration judge (App. 4) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 2008. App. 1. The jurisdiction of this Court rests on 28 U.S.C. sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 237(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. sec. 1227(a)(1)(H), allows the Attorney General to waive a ground of inadmissibility that existed at the time of admission to the United States as a permanent resident.

STATEMENT

The petitioner, Danilo Paed Tantay, was admitted to the United States as a lawful permanent resident on January 10, 1990, under the visa classification of an unmarried son of a U.S. citizen. He was actually married at the time. App. 5.

Removal proceedings were commenced on June 8, 2005, charging the petitioner with removability under sec. 237(a)(1)(A) of the Immigration and Nationality Act, (hereinafter "INA"), 8 U.S.C. sec. 1227(a)(1)(A), in that he was inadmissible at the time of admission due to his marriage. App. 5. Mr. Tantay applied for the forgiveness waiver of removal under sec. 237(a)(1)(H) of the INA, 8 U.S.C. sec. 1227(a)(1)(H). App. 6.

Section 237(a)(1)(H) of the INA provides that the provisions of the INA for removal of an alien who was inadmissible at the time of admission due to fraud or misrepresentation, whether willful or innocent:

> "may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D) [relating to certain aliens who assisted in Nazi persecution or engaged in genocide]) who –
>
> (i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and
>
> (II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time

> of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation."

In support of his application for the waiver, Mr. Tantay testified that in 1983, his 16-year-old girlfriend became pregnant. App. 14. Her parents, thereupon, pressured him into going through a marriage ceremony with their daughter to "save face" in the community.

Mr. Tantay's father offered to give the girl's parents a parcel of land to prove the family's good faith that Mr. Tantay would return to marry their daughter after he immigrated to the United States. The girl's parents refused the offer and insisted on having a marriage ceremony to avoid embarrassment in the community. App. 13.

Mr. Tantay believed that the marriage would not be registered because both the parents-in-law and the person officiating said that the ceremony was only for show to the community and would not be recorded in the National Census (where all marriages are registered in the Philippines.) App. 8.

By the time petitioner's turn on the visa waiting list was reached for his immigration, he had become the father of two children. Mr. Tantay candidly admitted to the immigration judge that he had concealed their births on his immigrant visa paper

work. App. 12. He explained to the immigration judge the circumstances described above – that he thought that his marriage was not a legally valid marriage as he was given what he then thought were the only copies of the marriage license, thus, causing him to believe that the marriage was never recorded. App. 8. This was consistent with the agreement with the girl's parents. The petitioner's testimony was corroborated by the sworn statement of Mr. Tantay's 73-year-old father. The father's statement also described the effect the petitioner's deportation would have on him and his wife. App. 11.

The immigration judge denied the waiver, ruling, *inter alia*, that the petitioner's initial entry fraud should be held against him. App. 7. The Board of Immigration Appeals affirmed. App. 3. A petition for review was timely filed with the court of appeals for the Ninth Circuit. On February 20, 2008, the court of appeals granted the government's motion to dismiss the petition for review for lack of jurisdiction. The court of appeals ruled that the BIA and the immigration judge could consider, in the exercise of discretion, the entry fraud in adjudicating the waiver pursuant to 8 U.S.C. sec. 1227(a)(1)(H). App. 1.

REASONS FOR GRANTING THE PETITION

The Attorney General, through his delegates, the Board of Immigration Appeals (Board or BIA) and the

immigration judge, erred as a matter of law, in considering the petitioner's initial entry fraud in deciding whether to grant the waiver under sec. 237(a)(1)(H) of the Immigration and Nationality Act (INA or Act), 8 U.S.C. sec. 1227(a)(1)(H). Prior to the Board's precedent decision in *Matter of Tijam*, 22 I. & N. Dec. 408 (BIA 1998), the Board and the immigration judges did not take into account the initial entry fraud in deciding the forgiveness waiver. The history and plain language of the forgiveness waiver of sec. 237(a)(1)(H), as well as prior decisions of this Court, require a finding that the Board of Immigration Appeals' consideration of the initial entry fraud was improper.

When the predecessor to sec. 237(a)(1)(H) was enacted in 1948, its humanitarian purpose was to forgive acts of fraud or misrepresentation in obtaining immigration to this country in the interest of family unity. Although the provision was amended in 1981, the heart of the waiver continues to offer relief from removal to those who used fraud or misrepresentation to come to this country who are "otherwise admissible." Read in conjunction with cases leading up to the 1981 amendments and the retention of the "otherwise admissible" language, the new version actually broadened its scope. The Attorney General could no longer side-step the waiver by lodging separate statutory allegations that actually flowed from the fraudulent act. Significantly, Congress continued to use the "otherwise admissible" language. This makes clear that Congress intended to leave intact a

statutory scheme that forbade consideration of the fraud that gave rise to the ground of removability in determining whether to grant the waiver.

The initial fraud concept is thus of statutory creation, making it clear that the original fraud is not to be weighed in determining the waiver. The Board's decision to consider the initial fraud is therefore *ultra vires* to the statutory scheme and must be reversed.

ARGUMENT

I.

THE HISTORICAL DEVELOPMENT OF THE FORGIVENESS WAIVER DOES NOT SUPPORT THE BOARD'S INTERPRETATION OF THE STATUTE; CONGRESS DID NOT GRANT THE BOARD DISCRETION TO INCLUDE THE INITIAL ENTRY FRAUD IN THE DETERMINATION OF THE WAIVER.

A. The first appearance of the forgiveness waiver and the "initial fraud" construction of "otherwise admissible"

The genesis of the forgiveness waiver was the enactment of the Displaced Persons Act of 1948, 62 Stat. 1009. This Act provided for the admission to the United States of thousands of war refugees, many from countries that had fallen behind the Iron Curtain. Some of these refugees misrepresented their place of birth or nationality to avoid being sent back to a communist country. In so doing, however, these

refugees became excludable for fraud. The plight of these refugees who were excluded from the United States inspired recurring proposals for statutory reform. When the immigration laws were revised and codified in 1952, the House Committee recommended adding a provision to forgive such refugees and allow them to avoid deportation when they had misrepresented their nationality or place of birth only to avoid repatriation and persecution. H.R. Rep. No. 1365, 82nd Cong., 2nd Sess. 128 (1952). The Conference Committee deleted the provision. In 1957, Congress did pass legislation which alleviated many of the stricter provisions of the earlier legislation. Pub. L. No. 85-316, 71 Stat. 639 (1957). The 1957 Act provided for special nonquota status for certain adopted children or illegitimate children and for some orphans. The law also allowed the Attorney General to waive certain grounds for exclusion or deportation, including affliction with tuberculosis or conviction of a crime involving moral turpitude, on behalf of aliens who have close relatives who were U.S. citizens or aliens lawfully admitted for permanent residence. H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7 (1957). *See also*, S. Rep. No. 1057, 85th Cong., 1st Sess. (1957).

This Court recognized that the

> "intent of the Act was plainly to grant exceptions to the rigorous provisions of the 1952 Act for the purpose of keeping family units together. Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or

> even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country."

I.N.S. v. Errico, 385 U.S. 214, 220 (1966).

In this context it is not surprising that Congress also granted relief from exclusion or deportation to aliens who had gained entry through misrepresentation. Section 7 of the 1957 Act, which later evolved into sec. 241(f), then sec. 241(a)(1)(H), and now sec. 237(a)(1)(H), provided, in pertinent part, that:

> "The provisions of section 241 . . . relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as (1) aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation, or (2) aliens who were not of the nationality specified in their visas, shall not apply to an alien *otherwise admissible* at the time of entry who (A) is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence; or (B) was admitted to the United States between December 22, 1945, and November 1, 1954 . . . and misrepresented his nationality, place of birth, identity, or residence in applying for a visa: Provided that such alien described in clause (B) shall establish to the satisfaction of the Attorney General that the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political

> opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions of the immigration laws or an investigation of the alien at the place of his former home, or residence, or elsewhere. . . ."

(emphasis added).

This Court was presented with the question of statutory construction of the phrase "otherwise admissible" in *I.N.S. v. Errico*, 385 U.S. 214 (1966). The Court noted that the statute waived deportation for two classes of aliens who entered by fraud or misrepresentation. The first class encompassed the alien who was the spouse, parent, or child of a United States citizen. These aliens were saved from deportation for the fraud if "otherwise admissible at the time of entry." The second class encompassed the alien who entered during the postwar period and misrepresented his or her nationality, place of birth, identity, or residence. These aliens were saved from deportation if "otherwise admissible at the time of entry" and also could establish that the misrepresentation was predicated on fear of persecution and "was not committed for the purpose of evading the quota restrictions." This Court concluded that:

> "Congress must have felt that aliens who evaded quota restrictions by fraud would be 'otherwise admissible at the time of entry' or it would not have found it necessary to provide further that, in the case of an alien not possessing a close familial relationship to a United States citizen or lawful permanent

> resident, the fraud must not be for the purpose of evading quota restrictions."

Id. at 222-23. Thus, the Court held that it was improper to deny relief to statutorily-eligible aliens who had close citizen family members if they had not complied with quota requirements. *Id.* at 223. This marked the recognition by the Court that as long as the alien had a close statutory relative, the relief should be granted. The initial act of misrepresentation to evade immigration requirements must be set aside in determining whether the person was "otherwise admissible."

B. Expansion under the 1981 amendments

In response to controversies that arose over the application of the forgiveness waiver after the *Errico* decision, Congress amended the provision in 1981. One controversy was whether a person who entered the United States on a false claim to citizenship was eligible to apply for the forgiveness waiver. In *Reid*, the Court held that an alien who accomplished entry by falsely claiming to be a U.S. citizen was not eligible for the waiver. *Reid v. I.N.S.*, 420 U.S. 619, 628 (1975).

The 1981 amendments codified *Reid* by adding language to sec. 241(f) that limited its application to those who were "in possession of an immigrant visa or equivalent document." That language was retained in 1990 when the provision was renumbered sec. 241(a)(1)(H) and, again, in 1996, as sec. 237(a)(1)(H).

Thus, the waiver is not available to all aliens who have entered through fraud or misrepresentation. The forgiveness waiver is only available to those who entered as *immigrants*.

The 1981 amendments resolved another issue identified in the *Reid* decision relating to the scope of the waiver. In *Reid*, this Court noted: "[n]or has there been agreement among those courts which have construed sec. 241(f) to waive substantive grounds for deportation under sec. 212 other than for fraud delineated in sec. 212(a)(19) as to which other grounds are waived." 420 U.S. at 629. In other words, the fact that an immigrant had committed fraud in entering might give rise to a separate, non-fraud ground of exclusion or deportation, such as a lack of a labor certification or valid visa. Thus, some courts refused to extend the forgiveness waiver when the immigration service charged excludability for lack of labor certification or valid visa even though those exclusion grounds were the direct result of the initial fraud or misrepresentation. *See, e.g., Escobar Ordonez v. I.N.S.*, 526 F.2d 969 (5th Cir. 1976); *Matter of Montemayor*, 15 I. & N. Dec. 353 (BIA 1975); *cf. Matter of Anabo*, 18 I. & N. Dec. 87 (BIA 1981). This was in spite of the fact someone who used fraud to obtain an immigrant visa, obviously possessed an invalid visa. So the government argued successfully in some courts that a person excludable for fraud was also excludable for possession of an invalid visa, to which sec. 241(f) did not apply. By arguing that an invalid visa or lack of labor certification charge was

distinct, the government could avoid the application of sec. 241(f). The BIA followed this restrictive logic:

> "We recognize that this construction of the statute drastically reduces the scope of section 241(f). . . . It means that there will virtually always be an alternative ground of deportability, not affected by section 241(f), in any case in which deportability can be predicated on section 212(a)(19) [fraud or misrepresentation; now section 212(a)(6)(C)]. In the case of an alien who entered with an immigrant visa . . . a common alternative charge would be based on section 212(a)(20) [invalid visa; now section 212(a)(7)]. However, the [Supreme] Court's opinion in *Reid* limits the applicability of section 241(f) to a section 241(a)(1) charge of deportability based on . . . 212(a)(19). . . . The respondent [in this case] remains deportable under the charges based on section 212(a)(14) [lack of labor certification] and section 212(a)(20) [invalid visa]."

Matter of Montemayor, 15 I. & N. Dec. 353, 356 (BIA 1975).

The 1981 amendments reversed this interpretation of sec. 241(f) and its successor, including sec. 237(a)(1)(H), by providing that the waiver is available so long as the alien "was otherwise admissible to the United States at the time of such entry except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of sec. 1182 of this title

[relating to possession of a valid labor certification and immigrant visa, respectively] which were a direct result of that fraud or misrepresentation." Thus, the 1981 amendments assured an expansive application of the forgiveness waiver insofar as its applicability to grounds of inadmissibility at entry directly resulting from the initial fraud or misrepresentation. The amendments resurrected the waiver in those jurisdictions that had allowed the government to elude sec. 241(f) by alleging invalid visa or lack of labor certification. Further, the waiver was extended to cover innocent as well as fraudulent misrepresentations.

The 1981 amendments also expanded sec. 241(f) by allowing the affected alien to maintain lawful immigrant status. Prior to 1981, sec. 241(f) merely acted as a bar to deportation. The forgiveness statute did not confer lawful immigrant status. *See, e.g., Yik Shuen Eng v. I.N.S.*, 464 F.2d 1265 (2d Cir. 1972). A person was essentially in limbo status and did not acquire lawful immigrant status unless some other form of relief was available such as registry or suspension of deportation. But since 1981, the forgiveness statute speaks in terms of "waiving" the grounds of exclusion for those entering as immigrants. By waiving exclusion grounds, the person retains immigrant status. *Matter of Sosa-Hernandez*, 20 I. & N. Dec. 758 (BIA 1993).

Thus, the 1981 amendments served to expand the waiver. Charles Gordon, former INS General

Counsel and co-counsel for the government in the *Errico* case explained:

> "As General Counsel of the Immigration and Naturalization Service I was involved in much of [the controversy and] litigation [over section 241(f)]. It seems to me that to some extent the problem has been caused by the excessive severity of this ground of exclusion and deportation, which continues perpetually. Courts often were impelled to adopt generous interpretations of the statute, in order to promote family unity. . . .
>
> The proposed amendments include the following elements: . . . The requirement that the beneficiary of the waiver be 'otherwise admissible' is defined to eliminate the inadmissibility for visa defects and absence of a labor certification. This reasonable modification will end some of the current controversy. . . . Specific provision is made to benefit those inadmissible for innocent misrepresentations. This is certainly desirable, since it seems unjustifiable to give one guilty of intentional deception greater benefits than one whose misstatement was innocent. Indeed, an early judicial holding, thereafter adopted by the Board of Immigration Appeals, found that section 241(f) waivers benefitted those who entered irregularly on the basis of innocent misstatements. *See In re Hon*, 289 F. Supp. 204 (S.D.N.Y. 1968); *Matter of Lim*, 13 I. & N. Dec. 169 (BIA 1969). However, this view apparently was rejected by dicta in *Reid v. INS*, 420 U.S. 619, 629-30

> (1975), and now has been repudiated by a recent decision of the Board of Immigration Appeals, *Matter of Raqueno*, 17 I. & N. Dec. 10 (BIA 1979). I support the more reasonable approach mandated by the proposed amendment."

Immigration and Nationality Efficiency Act of 1979, Hearings on S. 1763 Before the Senate Committee on the Judiciary, 96th Cong., 1st Sess. 36 (1979), at 54-55 (Statement of Charles Gordon, former General Counsel, INS).

C. Further expansion by the 1990 amendments

When the Immigration and Nationality Act was revised in 1990 (Pub. L. No. 101-649, 104 Stat. 4978), sec. 241(f) was renumbered as sec. 241(a)(1)(H). While the revised version looks quite similar to the 1981 version of sec. 241(f), Congress further expanded the benefits of the provision in two important respects. The pre- and post-1981 versions of sec. 241(f) refer to an alien who "is the spouse, parent, or *child* of a citizen" or lawful permanent resident alien. But the 1990 amendments changed the reference from a "child" to "son or daughter" thereby expanding coverage. A child is defined under sec. 101(b)(1) of the INA, 8 U.S.C. sec. 1101(b)(1), as a person who is unmarried and under the age of 21. A "son or daughter" on the other hand can be married and over 21.

The 1990 changes also expanded the range of misrepresentations resulting in excludability to coincide with the revised grounds for excludability for misrepresentation that were a part of the Immigration Marriage Fraud Amendments of 1986. *See* Gordon, *et al.*, *Immigration Law and Procedure*, sec. 71.04[2][a] (1996).

In 1996, the forgiveness waiver was renumbered as sec. 237(a)(1)(H).

II.

THE INITIAL FRAUD CONCEPT IS REQUIRED BY STATUTE; ITS APPLICATION IS NOT A REVOCABLE POLICY ADOPTED BY THE BIA AS A MATTER OF LENIENCY.

A. The introduction of discretion to sec. 241(f) in 1981 was directed at the broadened subject matter of the waiver

The forgiveness waiver was amended by Pub. L. No. 97-116, effective December 29, 1981, which modified the previously mandatory waiver of deportability for violation of INA sec. 241(a)(1) [8 U.S.C. sec. 1251(a)(1)] (excludable at entry) and sec. 212(a)(19) [8 U.S.C. sec. 1182(a)(19)] (visa fraud or misrepresentation) and expanded its scope. The amendment gave the Board discretionary authority over the broadened subject matter. The purpose of the amendment was two-fold: one, to expand the classes of people for whom the forgiveness waiver was available; and, two, to enable the Board to settle troublesome legal

questions regarding eligibility in an equitable manner. The amendment made relief available both for innocent and fraudulent misrepresentations and for aliens charged with excludability based upon a lack of a labor certification or valid immigrant visa. While the former may arguably be said to be merely a clarification, the latter is clearly an expansion, especially in light of how certain court interpretations had eviscerated the relief when lack of a labor certification or an immigrant visa were also alleged. The intent of Congress in amending the section and using the word "discretion" was not to enable the Board of Immigration Appeals to deport persons who are qualified for relief. Rather, the purpose of the amendment was to breathe life back into the forgiveness waiver by overruling judicial opinions that had allowed the government to elude the relief by alleging lack of labor certification or invalid visa and to alter agency authority at the margins by permitting the BIA to exercise its discretion in cases in which the courts were previously required to make fine distinctions. The House Report to the 1981 amendments states:

> "The scope of the waiver and the meaning of 'otherwise admissible' have become increasingly unclear. [The amendment] clarifies that the waiver is only intended to apply to immigrants and that it is available for innocent (as well as fraudulent) misrepresentations. By doing this and making the waiver discretionary, it should obviate the need for further litigation, and promote the uniform administration of this section."

H.Rep. No. 264, 97th Cong., 1st Sess. 24, reprinted in 1981 U.S. Code Cong. & Admin. News 2577.

Until this Court's decision in *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 117 S. Ct. 350 (1996), the Board and the immigration judges had held that the initial entry fraud/misrepresentation as well as any acts which flow from the initial fraud/misrepresentation may not be considered in deciding the waiver. *See Delmundo v. I.N.S.*, 43 F.3d 436 (9th Cir. 1994), *Braun v. I.N.S.*, 992 F.2d 1016 (9th Cir. 1993), *Yang v. I.N.S.*, 58 F.3d 452 (9th Cir. 1995), *rev.*, 519 U.S. 26 (1996).

The Court ruled in *Yang* that the Attorney General could consider subsequent actions in deciding the waiver even though they flowed from the initial fraud/misrepresentation. The Court in *dicta* also stated that the Attorney General could depart from the long-held rule of not counting the initial fraud/misrepresentation against the alien so long as it was not an "irrational departure from past policy."

The Board of Immigration Appeals took up this issue in *Matter of Tijam*, 22 I. & N. Dec. 408 (BIA 1998), and ruled that henceforth, the initial entry fraud/misrepresentation may be considered in deciding the forgiveness waiver under 8 U.S.C. sec. 1227(a)(1)(H).

B. The Board's rule in *Matter of Tijam* should be overturned because it is contrary to the statutory language of the waiver, not supported by the legislative history, and is an inexplicable departure from prior precedent.

The Board's reasons for departing from the long-held rule of not counting the initial fraud/misrepresentation were an irrational departure from prior practice and not authorized by *Yang*, *supra*.

The first reason given in *Tijam* was that the prior policy was set forth by the former Immigration and Immigration Service and that the Board cannot be bound by the INS' decisions. *Tijam*, at pp. 415-417. This statement fails to take into account that the Board and the immigration judges were part of the Immigration and Naturalization Service until the creation of the Executive Office for Immigration Review in 1983. *See* 48 Fed. Reg. 8039 (Feb. 25, 1983). Consequently, contrary to the Board's assertions, the decisions of the Commissioner of the Immigration and Naturalization Service were binding on all his subordinates, including the immigration judges at that time. This includes the *Matter of Alonzo* decision (17 I. & N. Dec. 292 (Comm'r 1979)) cited by the Board in *Tijam* which set forth the long-standing rule of not counting the initial fraud/misrepresentation in deciding the general fraud waiver under sec. 212(i) of the INA, 8 U.S.C. sec. 1182(i). The *Tijam* statement that "[w]e have articulated a rational basis for deciding to 'withdraw' from

the *Alonzo* ruling, which, in fact was never a ruling that this Board adopted as a precedent" (at p. 417) is inconsistent with the structure of the agency at the time of *Alonzo* in 1979. This reason for departing from the longstanding rule is irrational and not based upon any legal basis and thus cannot support the *Tijam* decision.

The second reason given by the Board for departing from its well-settled precedent of not considering the initial entry fraud was because the INS said that it would not follow prior precedent. The Board noted that "the Service states that it 'will hereinafter consider an alien's entry fraud as an adverse factor in determining whether an alien merits favorable exercise of discretion under sec. 241(a)(1)(H) of the INA.'" This is a clear misstatement of the law and the different roles of the immigration judges and the Service because the Service never had authority and jurisdiction over this type of application. Applications for relief under sec. 241 (now sec. 237) are not and have never been under the jurisdiction of the Service. The forgiveness waiver has always been made to the immigration judges in the course of a removal hearing. *See* 8 C.F.R. sec. 1240.11(d) and 8 C.F.R. sec. 1240.49(d) (2007).

Therefore, the Board's reliance on the Service's so-called change in non-existent policy regarding adjudication of applications never under the Service's jurisdiction, was exceptionally and extremely irrational, arbitrary and capricious, and just the type of departure that was condemned in *Yang*. The Board

did nothing more than to adopt the Service's litigating position that entry fraud should be considered. The Board failed to exercise its independent judgment in departing from well-settled precedent of this court and other circuits. *See Delmundo, supra, Braun, supra.* The Board abdicated its statutory and regulatory responsibilities in failing to act as an impartial adjudicative body and the *Tijam* decision must be overturned. *See, generally,* D. Marks, "An Urgent Priority: Why Congress Should Establish an Article I Immigration Court," 13 Bender's Immigration Bulletin 3 (January 1, 2008), *Melnitsenko v. Mukasey*, 517 F.3d 42 (2d Cir. 2008) (the government's refusal to stipulate to a motion to reopen may not, by itself, be the sole basis for the BIA's decision to deny a motion to reopen.)

In essence, *Tijam* changed prior precedent because the Board said that it could do so in the exercise of its discretion. The Board in *Tijam* alludes to the fact that the waiver in question used to be a mandatory waiver once the requisite familial relationship was established: "In adding a discretionary component to sec. 241(a)(1)(H), however, Congress was acting in keeping with the underlying purpose of predecessor provisions that granted 'relief to limited classes of aliens whose fraud was of such a nature that it was more than counterbalanced by after-acquired family ties.' (*Citing Reid v. I.N.S.*, 420 U.S. 619, 630 (1975) (addressing former sec. 241(f) of the Immigration and Nationality Act.))" The problem with the Board's statement regarding discretion is

that sec. 241(f) was still a mandatory waiver (*see* 420 U.S. at 622); it was not discretionary yet. What the *Reid* decision was referencing was the "class of aliens" in contrast to the class of "persons" who made a false claim to U.S. citizenship. In *Reid*, the aliens had entered the United States by falsely claiming to be citizens, thereby evading proper inspection as aliens. *Reid*, *supra*, at 620. The Court refused to extend the fraud waiver to this class of aliens who entered with false claims to citizenship and limited it to those aliens who presented themselves for inspection and admission as aliens. *Reid* had nothing to do with discretion.

The Court in *Errico v. I.N.S.*, 385 U.S. 214 (1966), recognized that the initial fraud/misrepresentation concept is not a matter of grace or discretion on the part of the Attorney General but required by statute. The initial fraud was not to be placed on any balancing scale. *Errico*, *supra*, at 223. The fact that the term "discretion" was added in 1981 does not change this result. The Board's decision in *Tijam* failed to take into consideration the historical development of the waiver as discussed above.

The petitioner's interpretation that the forgiveness waiver requires not considering the initial fraud/misrepresentation stems from the plain language of the statute. 8 U.S.C. sec. 1227(a)(1)(H) provides that deportation related to entry on the basis of fraud or misrepresentation, "whether willful or innocent, may, in the discretion of the Attorney-General, be waived

for any alien (other than an alien described in paragraph (4)(D)) who . . . is the spouse, parent, son, or daughter of a citizen . . . or [permanent resident] and was in possession of an immigrant visa or equivalent document and was otherwise admissible." The "otherwise admissible" language requires the putting aside of the initial fraud/misrepresentation before discretion is exercised, otherwise the provision would make no sense. In essence, the language means "other than the fraud or misrepresentation, the person was admissible." There would be no reason to include the "otherwise admissible" language if the initial fraud were to be part of the weighing process as the Board held in *Tijam*.

In short, the Board ignored the plain language of the statute and misconstrues the structure of the Immigration and Nationality Act, much as it did in *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In *Cardoza-Fonseca* the BIA attempted to equate the standard of proof for asylum ("well-founded fear of persecution") with that of withholding of deportation ("clear probability") found in two entirely different parts of the Immigration and Nationality Act and enacted under two entirely different circumstances. *Id.* at 430. Although the Service may have jurisdiction over the general fraud waiver under sec. 212(i) of the INA, 8 U.S.C. sec. 1182(i), it does not have jurisdiction over the initial-entry fraud waiver under sec. 237(a)(1)(H), 8 U.S.C. sec. 1227(a)(1)(H) – the immigration judges have exclusive jurisdiction over this type of waiver. The Service's policy on adjudicating waivers

under 212(i) should not be dispositive of how an immigration judge adjudicates waivers under 237(a)(1)(H). The forgiveness waiver deals with fraud or misrepresentation specifically relating to the manner of acquiring permanent residence. On the other hand, the general fraud waiver under sec. 212(i) encompasses other types of fraud to procure "other benefits" under the INA, for example, use of a counterfeit permanent resident alien card after an initial lawful entry as a tourist, or, making a frivolous asylum application after a lawful entry. Further, the general fraud waiver under sec. 212(i) requires a showing of extreme hardship while the initial-entry waiver under sec. 237(a)(1)(H) does not. Finally, the general fraud waiver under sec. 212(i) requires that the extreme hardship be to the alien's spouse or parent. Hardship to the alien's children does not matter. On the other hand, for the initial-entry fraud waiver, the effect of deportation on the alien's children may be considered. These two waivers were enacted by Congress to address two different problems. Therefore, the adjudication of these two different waivers must also be different.

The case before this Court is one involving the selection of criteria that can properly be weighed in the exercise of discretion. The petitioner's position is that the initial-entry fraud/misrepresentation may not be weighed and that the *Tijam* rule should be overturned. This case is one involving the selection of criteria as opposed to how to apply and weigh the proper criteria. The petitioner's interpretation flows

from the construction of the statute, and particularly the "otherwise admissible" language.

The *Tijam* decision violates the waiver statute by placing something on the scale that the statute forbids. This case is very much one of statutory construction.

Tijam's attempt to compare the initial-entry fraud waiver to waivers of criminal misconduct is misplaced and not supported by the clear language of the respective waivers. The criminal waiver under former sec. 212(c) and suspension of deportation under former sec. 244 do not contain the language of "otherwise admissible." The concurring opinion in *Tijam* by Board Member Villageliu noted that the Board "should not indiscriminately apply the test prescribed in *Matter of Marin* . . . [dealing with post-entry criminal behavior] by resident aliens to a situation where the adverse factor being considered is a misrepresentation at the time of entry." *Tijam* at 418.

Based upon the foregoing, the Court should overturn the Board's rule in *Tijam* and take the initial-entry fraud back off the balancing scale in deciding the forgiveness waiver and reaffirm the long line of precedents in *Delmundo*, *supra*, and *Braun*, *supra*.

Given the stakes, any doubt as to the proper construction of the forgiveness waiver should be resolved in the alien's favor. *See Delgadillo v. Carmichael*, 332 U.S. 388 (1947). The Court has already recognized that the law that first implemented the

forgiveness waiver "was not a punitive statute, and . . . 241(f) in particular was designed to accomplish a humanitarian result. We conclude that to give meaning to the statute in light of its humanitarian purpose of preventing the break up of families composed in part at least of American citizens, the conflict between the circuits must be resolved in favor of the aliens." *Errico* at 224-25. Even the dissent in *Errico* is consistent with petitioner's position. Justice Stewart argued that the aliens in *Errico* were ordered deported, not because of their fraud, but because they were not properly within their countries' quotas. He went on to note, however, that: "*Fraud is removed as a ground for deportation of those with the requisite family ties*, and 'otherwise admissible' insures the integrity of the statutory scheme." *Errico* at 229 (Stewart Dissent) (emphasis added).

CONCLUSION

For the foregoing reasons, review by this Court is necessary in this case to restore the intent of the legislative branch and to rein in unfettered discretion which was not granted by Congress to the Attorney General. The petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD HOM
Counsel for Petitioner
Danilo Paed Tantay

May 2008

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANILO PAED TANTAY, Petitioner, v. MICHAEL B. MUKASEY, Attorney General, Respondent.	No. 07-74186 Agency No. A42-425-998 ORDER (Filed Feb. 20, 2008)

Before: WALLACE, LEAVY and RYMER, Circuit Judges.

Respondent's motion to dismiss this petition for review for lack of jurisdiction is granted. *See* 8 U.S.C. § 1227(a)(1)(H); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157 (9th Cir. 2005); *cf. I.N.S. v. Yang*, 519 U.S. 26, 30-31 (1996) (holding that it is within the Board of Immigration Appeals' broad discretion to consider entry fraud in adjudication of waiver pursuant to former 8 U.S.C. § 1251(a)(1)(H)). The temporary stay of removal confirmed by Ninth Circuit General Order 6.4(c) and *Desta v. Ashcroft*, 365 F.3d 741 (9th Cir. 2004) shall continue in effect until issuance of the mandate.

All other pending motions are denied as moot.

DISMISSED.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: OCT 11 2007

File: A42 425 998 – San Diego, CA

In re: DANILO PAED *TANTAY*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gail A. Dulay, Esquire

ON BEHALF OF DHS: Monica Mubaraki
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] – Fraud or willful misrepresentation of a material fact

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] – Inadmissible at time of entry or adjustment of status under section 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] – Fraud or willful misrepresentation of a material fact

APPLICATION: Waiver of inadmissibility; voluntary departure

We affirm the Immigration Judge's decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an

Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). The respondent argues that the Immigration Judge erred in considering his initial fraud upon entry as the overriding factor in the denial of the requested relief, and argues that his fraud occurred more than 5 years ago and he is, therefore, eligible for voluntary departure. We disagree. In addition to this initial fraud, involving his marriage and stated lack of children, the Immigration Judge also considered the respondent's ongoing misrepresentations before the court. We agree with the Immigration Judge that a favorable exercise of discretion is not warranted in this case.

ORDER: the appeal is dismissed.

/s/ Frederick D. Hess
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Diego, California

File A 42 425 998 May 18, 2006

In the Matter of

DANILO PAED TANTAY,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(1)(A) of the Immigration and Nationality Act (inadmissible at the time of entry).

APPLICATIONS: Waiver under Section 237(a)(1)(H) Immigration and Nationality Act; voluntary departure at the conclusion of proceedings.

ON BEHALF OF RESPONDENT:
Gail A. Dulay, Esquire
110 West C Street, Suite 1700
San Diego, California 92101

ON BEHALF OF GOVERNMENT:
Monica Mubaraki
Assistant Chief Counsel
Department of Homeland Security
San Diego, California

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent herein is a native and citizen of the Philippines. He was placed under removal proceedings on June 8th, 2005 with the issuance of Notice to Appear (Exhibit 1). In this document, the Government alleges that respondent is not a citizen or national of the United States, but is a native and

citizen of the Philippines who was admitted to the United States at Los Angeles, California on or about January 10, 1990 as a P-11 immigrant, an unmarried son of a United States citizen. The Government further alleges the respondent procured his admission, visa, adjustment, or other documentation or benefit by fraud or by willfully misrepresenting a material fact, to wit: you knowingly concealed, our true marital status when you were admitted to the, United States as the unmarried son of a U.S. citizen, when in fact you were married.

Respondent was charged with removability under Section 237(a)(1)(A) of the Immigration and Nationality Act, in that at the time of entry or adjustment of status, respondent was within one or more of the classes of aliens inadmissible by the law existing at such time, to wit, aliens who seek to procure or have sought to procure, or who have procured a visa, other documentation or admission into the United States or other benefit provided under the Act by fraud or willfully misrepresenting a material fact under Section 212(a)(6)(C)(i) of the Immigration and Nationality Act.

During the course of these proceedings, respondent, through counsel, admitted the truth of the factual allegations contained in the Notice to Appear and conceded his removability on the basis of the charge set forth therein. (See Exhibit 2). Based upon these admissions and concessions, I find that respondent's removability has been properly established as required by law.

Respondent has chosen the Philippines as the country for removal purposes, if necessary.

Respondent has made application for a waiver under Section 237(a)(1)(H) of the Immigration and Nationality Act. Alternatively, he requests voluntary departure at the conclusion of proceedings.

Section 237(a)(1)(H) of the Act, provides in pertinent part that the provisions relating to this paragraph relating to the removal of aliens within the United States on the grounds that they were inadmissible at the time of admission as aliens, described in Section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien who is the spouse, parent, son or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence and was in possession of an immigrant visa or equivalent document and otherwise admissible to the United States at the time of such admission, except for certain grounds of inadmissibility not pertinent herein.

The statute further provides that a waiver of deportation for fraud or misrepresentation granted under this paragraph also operates to waive deportation based on grounds of inadmissibility directly resulting from the fraud or misrepresentation.

Respondent has submitted numerous documents to the Court relative to his application for relief and has presented his own testimony and declaration of his father which is at Exhibit 7. The Court has reviewed and considered all testimony and evidence of record.

The obligation of the Court is to balance the adverse factors in respondent's case against the favorable factors to determine whether or not it is in the best interest of the United States to allow the respondent to remain in this country. The adverse factors may include the nature and underlying circumstances of the fraud or misrepresentation involved, the nature, seriousness, and recency of any criminal record, other evidence of bad character, or undesirability as a permanent resident. Favorable factors include such things as family ties in the United States, residence of long duration in this country, particularly when such residence began when the respondent was of a young age, evidence of hardship to the respondent and his family if deportation or removal were to occur, a stable employment history, the existence of property or business ties, evidence of value and service to the community, and other evidence attesting to the respondent's good character.

Respondent bases his claim for a waiver under Section 237(a)(1)(H) on his relationship to his United States lawful resident mother and lawful resident father, both of whom were present throughout these proceedings.

Respondent was questioned regarding his application for relief at a hearing conducted before the undersigned on April 10, 2006. At that time, under questioning by his attorney, respondent essentially admitted to the Court that he immigrated to the United States unlawfully. He further noted in the

year 2000 he attempted to petition for his wife and children in the Philippines to immigrate to the United States as lawful residents. He explained that he has originally married his wife in the Philippines in 1983, and then went through a second marriage ceremony with her in 1997 in order to be able to petition for her and the children. Respondent claimed in essence that he was not aware that he was married in 1983 because his mother-in-law gave him a copy of the proof of marriage, which act to mean that he was not married. He admits that he did marry in 1983 while under a petition to immigrate to the United States because he felt pressured by his in-laws. He notes to the court that the in-laws sent to him in the United States three copies of the marriage documents, an act he took to mean that he was not really married. He thought upon receipt of those documents that he had all of the documents which would show or prove any marriage in the Philippines. He also claims that he spoke to the judge who performed the marriage ceremony in 1983, who told him the marriage was just a formality and had no legal effect and that the marriage wouldn't be reported in the census.

Respondent states that shortly after the marriage ceremony in 1983, he told his parents that the marriage had taken place but was not valid.

He underwent a second marriage ceremony in 1997 and did not at that time check to see if the first marriage was recorded. He apparently claims that when he put down in his immigration paperwork that he was unmarried, he believed he was unmarried. He

does admit that when he was asked about children in his immigrant paperwork, he said that he had none. He notes that a family friend helped him with the paperwork.

He acknowledges that after his second marriage he filed visa petitions for his wife and children who still reside in the Philippines. When his wife went for his visa interview, she was shown the proof of the 1983 marriage and at that time the visa request was refused. When respondent heard about this, he told his wife to talk to the in-laws to find out if respondent and his wife were really married in 1983. When he spoke to the in-laws, they insisted that they didn't know if the 1983 marriage had been registered. Respondent has no idea who registered the marriage but suspects that his in-laws did so. Respondent claims to believe that an unregistered marriage in the Philippines is not legal.

Before immigrating to the United States respondent worked in the Philippines as a steelworker, but claims he wasn't making enough to support himself and his family. He notes that his wife does not presently work and that he sends her approximately $900 per month. His children in the Philippines are now aged 18 and 22 and they are both still going to school. Respondent owns no property in the Philippines. If returned to his native country, respondent claims that he's not sure how he'll earn a living or support his family financially. He wonders that there would not be any jobs for him and that he may not be able to send his children to school. Furthermore, he points

out that the government in the Philippines is not as stable as that here in the United States.

Over the years, he has admittedly returned to the Philippines for visits on about seven occasions.

Respondent says when his own parents found out that his wife's visa had been denied, and that his first marriage had been registered in the Philippines, his mother became depressed that respondent might have to return to the Philippines. He worries that his parents, who have medical problems, will be depressed, and he worries that if he is not in the United States no one will be able to take his parents to the doctor or run errands for him. He does admit that he has other siblings in the United States who help the parents as well. He denies any other immigration or criminal violations.

Respondent also emphasizes that he has done volunteer work in the United States with his local church. More specifically, he helps out on Wednesday evenings at bingo events. He also donates money to the church and to other charitable causes.

Respondent is presently employed as a self-employed carpenter with his younger brother. He notes that being self-employed gives him the flexibility to take his parents to doctor appointments and other appointments, as necessary.

Respondent asked for a second chance to remain in the United States so she [sic] can provide a good future for his children.

As earlier noted, respondent has also submitted to the Court a declaration or affidavit, which is in the record of proceedings at Exhibit 7. The Court has reviewed and considered the contents of that declaration and incorporates them by reference.

In reviewing the entire record, the Court notes several positive factors. Respondent has lived in the United States for over 16 years and he has been employed in the United States over the years with only one period of unemployment. He has apparently paid any taxes owed to the United States Government. He has no criminal record and volunteers his time at church and there are several letters which have been submitted in his behalf in support of his claim.

Respondent has several family members in the United States, many of whom were present in court throughout the proceedings and they are apparently supportive of him. The relatives include his United States citizen mother, lawful resident father, four U.S. citizen siblings, and four lawful resident siblings. Respondent claims a good relationship with all of these family members. The Court notes as well that respondent's parents appear to rely on respondent to some extent both emotionally and financially. They have medical problems which are evidenced in doctor's letters which have been submitted to the Court and the respondent helps take them to the doctor and other errands as needed. The parents would no doubt miss respondent's assistance and

proximity if he were to be removed from the United States.

On the other hand, the Court notes that all of the time that the respondent has amassed as a resident of this country was as a direct result of his misrepresentations to consular and immigration officials regarding his true marital status and whether he had children. Respondent immigrated to the United States claiming to be a [sic] unmarried person with no children. In fact, as earlier noted, respondent was married in the Philippines on November 27, 1983 to Cheryl Linda S. Aquino. The marriage contract is in the record of proceedings at Exhibit 5. In further point of fact, respondent was the father of two children, from his liaison with Cheryl Linda Aquino when he willfully misrepresented to immigration officials that he has no children.

In seeking a waiver under Section 237(a)(1)(A) in the instant proceedings, respondent asks this court to take his word for the idea that although he did go through a marriage ceremony in the Philippines, he never believed it to be a valid binding marriage. More specifically, he claims he just went through the ceremony to please his in-laws who allegedly pressured him and promised, along with the official who performed the ceremony, that the ceremony was just, in essence, a show for the community, and that the marriage contract would never be recorded. He claims he was later surprised to learn that it had never been recorded.

The Court begins with the premise that the respondent is not adverse to misrepresenting the true facts in order to gain immigrant status in the United States. He is also clearly reluctant at this point to accept responsibility for those misrepresentations. He seeks in these proceedings to downplay the existence of the 1983 marriage by claiming that he never thought it was valid. And he even tries to justify the misrepresentation regarding his children, although claiming he's sorry by pinning the blame for both misrepresentations on alleged pressure from his in-laws and the person who helped prepared [sic] his immigrant petition. He doesn't really articulate what pressures were so severe as to cause him to lie United States officials to obtain resident status and, perhaps more significantly fails to present any corroborating documentation from his wife, in-laws, and his own sister Terisita (the latter of whom lives in San Diego, California) attesting to his version of what the marriage ceremony was all about. All of these individuals were present for the ceremony, yet none has confirmed his version of events. His claim that the marriage ceremony was just for show makes no sense. If the parents of his bride were so adamant that the respondent marry the bride before he immigrated, so he wouldn't abandon her after he got here, but they turned down an offer from the respondent's father to deed to them a piece of real property in the Philippines as purported for respondent's promise that he would marry her after he immigrated. It makes no sense that they felt so strongly about respondent cementing his relationship before he left

the Philippines that they would then pressure him to go through a nonbinding marriage ceremony just for show to the community. The Court does no [sic] buy this story.

From this vein, the Court notes that the documentation regarding the marriage at Exhibit 5, shows that the marriage was performed by a municipal, trial judge. Respondent would have this court believe that this sworn public-official, for no apparent reason or motive, would participate in a mock ceremony. The marriage contract shows that two days before the marriage, a marriage license was obtained. If the ceremony was in fact just for show, it makes no sense that a marriage license would have to be obtained. The marriage contract says that respondent and his wife "were with their mutually consent, lawfully joined together in holy matrimony." Respondent signed the contract. Further, the objective facts show that respondent's bride was already pregnant and that he lived with her continuously after the marriage and he fathered another child with her before he immigrated. Respondent's sister was present at the ceremony and is listed on the marriage contract as a consenting witness. Perhaps most importantly, if respondent truly believed that the marriage was invalid, he would have been truthful on his visa application relative to the existence of two children, because having children, in and of itself, would not bar him from immigrating as an unmarried person. It is clear that respondent failed to truthfully acknowledge the existence of this two children because

he knew that if he listed them immigration officials would conduct further inquiry and find out respondent was married.

The fact of respondent's marriage of 1983 was also conveniently concealed by respondent when he later filed a visa petition to immigrate his wife and children after he had immigrated. To accomplish his goal of immigrating the wife and children, without disclosing the fact he had already married in 1983, respondent remarried his wife in the Philippines on one of his several return trips to that country. By virtue of his failure to disclose the 1983 marriage in his visa petition for the wife and children, respondent continued the fraud against the United States Government. And by virtue of respondent's continuing insistence while under oath before this court, that he never believed the former marriage was valid, respondent is seeking to continue the fraud so he can keep the resident status he unlawfully obtained. This is a very serious negative factor.

Even some of respondent's own witnesses who submitted declarations or letters of support in his behalf (see for example Exhibit 4) acknowledged that respondent "lied about his marital status," a fact that respondent still refuses to acknowledge himself.

This Court acknowledges that it is no doubt a great comfort to respondent's parents, who have medical problems, to have respondent with him here in the United States and to have his assistance when they need it. On the other hand, respondent has

seven other siblings living lawfully in the United States to help ease any emotional and financial readjustment the parents might fact if respondent was to be removed. In point of fact, the parents survive without any apparent significant difficulty during the several years he remained in the Philippines after they immigrated. If respondent is removed, he would at long last be fully reunited with his wife and children in the Philippines, and, although the children have been raised without respondent's presence and guidance, they would no doubt welcome a reunion with their father. Indeed, respondent was seeking to reunite with his wife and children when he petitioned to immigrate them. Primarily the thrust of respondent's claim was to be that he needs to remain in the United States for the financial well being of his wife and children. This aspect of respondent's case is, however, weak as well, in that respondent has never been a substantial owner in the United States. In 2004, according to his taxes, his gross receipts were only $6300 and his adjusted gross income was only $4,126. In 2003, his gross receipts were only $2,250 and his adjusted gross income was only $3,949. There is no tax return for 2002. His 2001 return shows total wages of only $1,530. It is hard to believe that anyone, including respondent's wife and children have relied on his income in the past several years. Additionally, respondent has admitted for three years he was unemployed here in the United States. His claim that he sent monthly support to his wife and children in the years 2002, 2003, and 2004, and that such monthly

support was in the sum of $400 to $600 monthly, does not square with the income which he has claimed on his tax returns.

Respondent is still relatively young and enjoys good health. If returned to the Philippines, he has been employed there previously as a steel worker. During his years in the United States he has acquired employment skills in carpentry, electronics, hotel work, and construction. These skills should serve him well in any job search.

Having balanced the favorable factors in this case against the unfavorable, I conclude that the unfavorable factors control and further conclude the respondent has failed to sustain his burden of establishing that he is deserving of his waiver as a matter of discretion. His application for the waiver, must, therefore, be denied.

Although respondent indicated at the master calendar session conducted before the undersigned on August 5, 2005, that he would alternatively request voluntary departure at the conclusion of proceedings, no evidence was presented regarding his direct eligibility for that relief.

The Court would in any event deny voluntary departure as a matter of discretion in view of respondent's apparent continued attempts to seek to perpetrate a fraud in the United States Government while under oath regarding the viability of his 1983 marriage. I would conclude on the basis of his testimony regarding his waiver that he has failed to show good

moral character, and I would deny voluntary departure as a matter of discretion, again based upon respondent's continuing attempts to perpetrate a fraud upon this Court and the United States Government.

On the basis of the record before me, I conclude that respondent has failed to exhibit eligibility for any relief from removal and none will be granted to him.

ORDER

IT IS HEREBY ORDERED that the respondent's applications for a waiver under Section 237(a)(1)(H) and for voluntary departure at the conclusion of proceedings under Section 240B(b) of the Act be and the same are hereby denied.

IT IS FURTHER ORDERED that respondent be removed from the United States to the Philippines on the basis of the charge contained it the Notice to Appear.

KENNETH A. BAGLEY
Immigration Judge